

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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RAMON RAMIREZ,

Plaintiff,  
-against-

97 CV 1522 (SJ)

MEMORANDUM AND

UNITED STATES,  
Respondent.

ORDER

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APPEARANCES:

RAMON RAMIREZ  
#41136-053  
P.O. Box 7000  
West 5802  
Fort Dix, NJ 08640  
Petitioner, Pro se

ZACHARY W. CARTER  
United States Attorney  
Eastern District of New York  
1 Pierrepont Plaza  
Brooklyn, NY 11201  
By: Eric D. Bernstein, Esq.  
Attorneys for Respondent

JOHNSON, District Judge:

Petitioner Ramon Ramirez pled guilty to one count of conspiracy to import narcotics and was sentenced on August 8, 1995. His sentence survived direct appeal, and he now moves this Court to vacate and modify his sentence pursuant to 28 U.S.C. § 2255. Petitioner alleges three grounds for his collateral attack: (1) he was deprived of his right to effective assistance of counsel; (2) the government breached its plea agreement with Petitioner; and (3) this Court failed to comply with Rule 32(c)(3)(A)

of the Federal Rules of Criminal Procedure. All of Petitioner's claims either fail as a matter of law or are procedurally barred.

### **BACKGROUND**

On November 4, 1993, Petitioner and other co-defendants were indicted on charges of conspiracy to import narcotics, importation of cocaine into the United States, and possession with intent to distribute cocaine. On December 13, 1994, Petitioner entered into a plea agreement, which included the prosecutor's stipulation that the government would "make no motion for an upward departure" under the U.S. Sentencing Guidelines.

In preparation for sentencing, the Probation Department prepared a Presentence Investigation Report ("PSR") in which it recommended a two-point role enhancement adjustment in the offense level. At sentencing, the prosecution argued for the adjustment. This Court asked counsel for the defense whether it had reviewed the PSR with his client, and the attorney replied that he had. The role enhancement adjustment was granted, and Petitioner was sentenced to 87 months imprisonment.

### **DISCUSSION**

Under § 2255 a sentencing court may "vacate, set aside or correct" a conviction or sentence "imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255. Relief is generally available only for a constitutional error, defect of jurisdiction, or an error of law constituting "a fundamental defect which inherently

results in a complete miscarriage of justice.” Carter v. United States, No. CV-92-4169, 1992 WL 390273, at \*2 (E.D.N.Y. Dec. 11, 1992), aff’d, 17 F.3d 1426 (2d Cir. 1994) (quoting Hardy v. United States, 878 F.2d 94, 97 (2d Cir. 1989)). Claims not raised on direct appeal are barred from consideration in a subsequent §2255 motion, unless the petitioner can show cause for the procedural default and actual prejudice resulting therefrom. United States v. Frady, 456 U.S. 152, 167-68 (1982) (applying standard to non-constitutional claims); Campino v. United States, 968 F.2d 187, 189-90 (2d Cir. 1992) (applying standard in case involving constitutional error).

Petitioner argues, in support of his claim of ineffective assistance of counsel, that his trial attorney failed to alert this Court to the government’s alleged breach of the plea agreement and misrepresented that he had reviewed the PSR with Petitioner. These arguments were not raised on direct appeal; however, the Second Circuit has recently held that ineffective assistance claims may be brought for the first time in a §2255 motion without satisfying the “cause and prejudice” standard, unless (1) the petitioner is represented by new appellate counsel on direct appeal and (2) the claim is based solely on the record developed at trial. Billy-Eko v. United States, 8 F.3d 111, 114-15 (2d Cir. 1993).

The record in this case establishes that Petitioner did have different counsel on direct appeal than during his trial. Thus his claim based on trial counsel’s alleged failure to point out the government’s breach of the plea agreement – a claim that

would have been fully established by the trial record – is subject to the cause and prejudice requirement. Billy-Eko, 8 F.3d at 115. Petitioner does not advance, and the record does not support, any cause for his failure to raise this claim on direct appeal.

The second allegation, that trial counsel misrepresented that he had reviewed the PSR with Petitioner, would have required additional factual inquiry outside the scope of the trial record. Therefore we proceed to the merits of this claim.

To prove ineffective assistance of counsel in violation of the Sixth Amendment, Petitioner must show that “counsel’s representation fell below an objective standard of reasonableness” under “prevailing professional norms,” and that he was prejudiced as a result. Strickland v. Washington, 466 U.S. 668, 688, 693-94 (1984); United States v. Kirsh, 54 F.3d 1062, 1071 (2d Cir.), cert. denied, 516 U.S. 927 (1995). Regarding the first element, Petitioner must overcome “a strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance.” Strickland, 466 U.S. at 689. To satisfy the prejudice requirement, he “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694; United States v. Hansel, 70 F.3d 6, 8 (2d Cir. 1995).

In the instant case, Petitioner is unable to satisfy the second prong of the Strickland test. Had trial counsel informed this Court of his alleged failure to review the PSR with Petitioner prior to sentencing, Petitioner would have been permitted to

read and discuss it with counsel at that time, pursuant to the Federal Rules of Criminal Procedure. See Fed. R. Crim. P. 32(c)(3)(A). Petitioner has made no showing that a different sentence might have resulted had counsel's purported error not occurred. Therefore his ineffective assistance claim must fail.

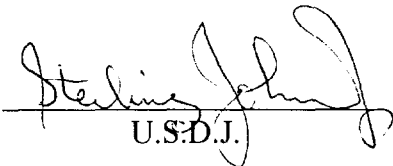
Neither of Petitioner's remaining claims – this Court's alleged noncompliance with Rule 32(c)(3)(A) and the government's breach of the plea agreement – were raised on direct appeal. Petitioner does not clearly state a cause for this procedural failure; the only conceivable ground, based on review of the record, is ineffective assistance, which Petitioner has not adequately established for the reasons discussed above. These claims are thus procedurally barred. Campino, 968 F.2d at 189-90.

### CONCLUSION

For the foregoing reasons, Petitioner's motion to vacate and modify his sentence is hereby DENIED.

SO ORDERED.

DATED: November 5, 1998  
Brooklyn, New York

  
U.S.D.J.